IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28-07-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

L.P.A.NO.131 OF 2001

Ramathal,
W/o.Marappan .. Appellant/1st Respondent

Vs.

1. Suppathal
   W/o.late Subramaniam

2. Suppathal
   W/o.Subramaniam

3. Saraswathi,
   W/o.Nanjukutti

4. Palanisamy

5. Kavitha
   Respondents 4 and 5 treated
   as major vide order of Court
   dated 14.7.2005 made in
   LPA.No.131 of 2001 .. Respondents

Appeal filed under Clause 15 of the Letters Patent against the judgment and decree dated 27.7.1999 made in A.S.No.1022 of 1985, on the file of this Court.

For Appellant : Mr.V.K.Muthuswamy
Senior Advocate for
Mr.M.M.Sundresh

For Respondent-1 : Mr.S.K.Ragunathan for
Mr.K.Srinivasan

Respondents 2 to6 : Served - No Appearance

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J U D G M E N T

P.K. MISRA, J

Plaintiff is the appellant against the reversing judgment.

2. Appellant filed O.S.No.72 of 1984 before the Sub Court, Tiruppur, which was subsequently transferred to the Sub Court, Coimbatore and renumbered as O.S.No.525 of 1985. The suit was for partition. One Thanga Gounder, the grandfather of the plaintiff, had a son named Palanichamy Gounder. Palanichamy Gounder, who died in 1961, and his wife Ramathal, who died in 1981, had three sons and three daughters, including the plaintiff. One of the sons, namely, Natarajan had died in 1977 without leaving any issue. Another son Subramaniam had died leaving behind his widow Suppathal, Defendant No.4 and two minor children, Defendant Nos.5 and 6. The only other surviving son of Palanichamy Gounder, Chinnappa Gounder was arrayed as Defendant No.1. Two other daughters were arrayed as Defendant Nos.2 and 3.

According to the plaintiff's case, the suit properties were purchased by Palanichamy Gounder and Ramathal and were the self-acquired properties of Palanichamy Gounder and Ramathal. Since one of the sons Natarajan died issueless, the other surviving children, including the plaintiff and Defendant Nos.4, 5 and 6 representing the branch of the second son Subramaniam, are entitled to 1/5th share in the disputed properties.

3. Defendant No.1 and Defendant Nos.2 and 3 remained ex parte and did not contest the suit. A written statement was filed by Defendant No.4, the widow of Subramaniam. It was claimed by her that the disputed properties are joint family properties as those have been purchased by Palanichamy Gounder and Ramathal by selling the ancestral properties and also from the joint exertion of Palanichamy Gounder and his sons, but some of the properties had been purchased benami in the name of the mother. It was further asserted that the plaintiff and her sisters have executed a release deed in respect of their shares and have executed a document of re-sale and as per such family arrangement if sale consideration amount was paid by Defendant No.1 and Defendant No.4's husband, re-sale deed would be executed by the daughters. According to such written statement, the plaintiff was entitled to 1/28th share in the disputed properties and the suit had been filed only at the instigation of the first defendant. The rice mill, part of the suit property, belong to the first defendant, husband of the fourth defendant and their other brother, namely, Natarajan and the fourth defendant discharged the debt of Natarajan as per the family arrangement, he had got the share of Natarajan and the female members have no share in the share of Natarajan. It was further stated that as per the decision of the Panchayat, a release deed and sale deed was executed in respect of such rice mill.

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4. The trial court framed the following issues :-

"1. Whether it is true that the properties purchased in the name of Ramathal and Palanichamy Gounder are from out of the sale proceeds obtained by way of selling the ancestral properties and also from the exertion of male members ?

2. It is true that the female members are not entitled to any share in the suit property ?

3. It is true that the plaintiff and her sisters have relinquished their share in the suit property ?

4. It is true that the plaintiff is entitled to 1/28th share ?

5. Whether the Rice mill was constructed between the year 1972 and 1974 and whether it belongs to the first defendant, 4th defendant's husband and brother of the abovesaid defendant Natarajan ?

6. Whether it is true that as per the family arrangement the first defendant had relinquished his rights in favour of the fifth defendant ?

7. Whether it is true that the female members of the family have agreed to receive Rs.20,000/- for themselves each and Rs.30,000/- for their mother and relinquished their rights in the suit property ?

8. Whether the resale agreement in respect of Rice Mill is true ?

9. Whether it is true that the release deed and sale deed executed by the husband of the fourth defendant will not bound the fifth and sixth defendants ?

10. It is true that the female members have no right in the Rice Mill ?

11. Whether the Rice Mill and the execution in favour of the plaintiff in respect of the land standing in the name of the mother is correct ?

12. It is true that the defendants 2 and 3 are not entitled to claim a share in the suit property ?

13. Whether the claim of the fourth defendant that herself and her children are entitled to 2/3 share and the first defendant is entitled to 1/3 share is true ?

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14. Is the plaintiff entitled to any other relief ?”

5. The trial court found as follows :-

The assertion of the fourth defendant that Natarajan had given his share to the husband of the fourth defendant has not been established. From the evidence on record it cannot be concluded that the landed properties were purchased from out of the sale proceeds of other ancestral properties. Palanichamy Gounder had left for Ooty and worked as a labourer and had also taken lands on lease and had earned money and it cannot be concluded that from the sale consideration of Rs.6,000/- obtained through Exs.B-5 and B-6 during 1952 and 1958, the properties worth about Rs.90,000/- had been purchased. Fourth defendant had failed to prove that the disputed properties were joint family properties. Ex.A-1 was the release deed executed by the defendants which indicated that other family members had relinquished their right in favour of Ramathal. Ramathal had executed Ex.B-2 sale agreement in favour of first defendant and husband of the fourth defendant. Ex.B-7 is the deed of relinquishment of the right of share in the property by Suppathal and Saraswathi executed in favour of the first defendant and his brothers, but it is not known whether the plaintiff had relinquished his share in the disputed property. It is not established that either the plaintiff or other daughters of Palanichamy Gounder have relinquished their right in the suit property. It is also not established that by family arrangement the plaintiff and other female members have been excluded. Ultimately, on the basis of the aforesaid main conclusions, the trial court had held that the plaintiff and the defendants 1 to 3 are entitled to 1/5th share each and the defendants 4 to 6 together are entitled to 1/5th share of the deceased Subramaniam.

6. Against the aforesaid decision of the trial court, appeal was filed by the fourth defendant. During pendency of the appeal, original Defendant No.1 died. However, the appellant in such appeal at that stage had filed C.M.P.Nos.11568 to 11570 of 1999 respectively for condonation of delay, setting aside the abatement and for substitution in the place of the deceased Respondent No.2 (original Defendant No.1). The appellant had also simultaneously filed C.M.P.No.11571 of 1999 seeking exemption from bringing on record the legal representatives of such second respondent.

7. Learned single Judge, while disposing of the appeal, allowed the application C.M.P.No.11571 of 1999 by applying the provisions contained in Order 22 Rule 4 of CPC by observing that such respondent had remained ex parte in the trial court and had not filed any written statement, and in view of such order the other three applications were dismissed as unnecessary.

8. By relying upon the decision reported in 1996(I) MLJ 320 (KANDASAMI v. ADI NARAYANAN), the learned single Judge concluded that in the case of acquisition in the name of the father or kartha, it is for such a person to explain that the acquisition has been made only from his separate funds and

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not from the joint family funds or nucleus and, therefore, it is for the plaintiff to prove that her father had purchased the disputed properties from his self-earnings. It was further concluded by the learned single Judge that the vague evidence on record did not have the effect of discharging such burden on the plaintiff that the properties had been purchased out of separate income. In view of the aforesaid conclusions, the learned single Judge without going into other findings, dismissed the suit. The present appeal is against the aforesaid decision.

9. Learned Senior Counsel appearing for the appellant has raised the following submissions :-

(i) Since fourth defendant was claiming that the properties had been purchased from out of the joint family nucleus, it was for the fourth defendant to prove that there was sufficient joint family nucleus from out of which the properties could have been purchased by Palanichamy Gounder and in the absence of any proof of sufficient nucleus, the learned single Judge was not justified in placing the burden on the plaintiff to prove that the properties had been purchased from the separate earnings of Palanichamy Gounder.

(2) Since some of the purchases were also in the name of the father and mother, the presumption relating to acquisition was not available and it was for the fourth defendant to prove that the properties were purchased benami in the name of a female member.

(3) Even assuming that the properties were joint family properties as contended by Defendant No.4, entire suit should not have been dismissed and the plaintiff is entitled to a reduced share.

10. Learned counsel appearing for the respondents, while supporting the conclusion of the learned single Judge that it was for the plaintiff to prove that the properties which had been purchased in the name of the father had been purchased from out of the separate income of the father, submitted that in view of the relinquishment by the plaintiff she was not entitled to any share in the joint family property. Learned counsel appearing for the respondents apart from relying upon the decision of Justice Raju, as His Lordship then was, reported in 1996(I) MLJ 320, has placed reliance upon a recent Division Bench decision of this Court reported in 2005(4) CTC 457 (P.R. KANNAIYAN (DIED) AND OTHERS v. RAMASWAMY MANDIRI AND OTHERS).

11. Learned counsel appearing for the appellant on the other hand has submitted that in view of the decision reported in (2003) 10 SCC 310 (D.S.LAKSHMAIAH AND ANOTHER, v. L. BALASUBRAMANYAM AND ANOTHER), the observation made in 1996(1) MLJ 320, which in its turn had relied upon a Division Bench decision reported in 1995(1) MLJ 336 (K. SENGODAN v. K. DHARMALINGAM AND OTHERS), cannot be considered to have laid down the correct proposition of law. It has been submitted by him that even though

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in the recent decision in 2005(4) CTC 457 such Supreme Court decision has been referred to, the matter has not been properly considered and the well settled principle as reflected in (2003) 10 SCC 310 should be applied.

12. In 2005(4) CTC 457 (cited supra), it was observed :-

> "... it is apparent that an exception is carved out in the matter relating to acquisition in the name of Karta, where it is proved that Karta had no independent income and he is in possession of some nucleus and not necessarily sufficient nucleus of the joint family property. In such a case, even where sufficient nucleus is not proved but existence of some nucleus is proved and it is further proved that Karta or Manager, in whose name property had been purchased, had no independent income, the burden is shifted to the Karta to prove that the property has been acquired without the aid of the joint family (property ?) and with the own separate income of the Karta or the Manager. We hasten to add that such principle is inapplicable, where it is shown that Karta has some separate and independent income, in which event, the normal principle that it is for the person claiming a particular acquisition to the joint family property to prove that there was sufficient surplus from the joint family property from out of which the property in question could have been acquired."

13. The aforesaid exception has been carved out on the basis of the observation made by the Supreme Court in AIR 1961 SC 1268 (MALLESAPPA BANDEPPA DESAI AND ANOTHER v. DESAI MALLAPPA alias MALLESAPPA AND ANOTHER) :-

> "15. In this connection it is necessary to bear in mind that respondent-1 has not shown by any reliable evidence that the expenses for the said litigation were borne by him out of his pocket. It is true that both the courts have found that respondent-1 purchased certain properties for Rs.600/- in 1925 (Ex.B-4). We do not know what the income of the said properties was; obviously it could not be of any significant order; but, in our opinion there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners. But, apart from the question of onus, the evidence given by respondent 1 in this case has been disbelieved, and in the absence of any satisfactory material to show that respondent 1 had any means of his own it would be idle to contend that the expenses incurred for the litigation in question were not borne by the joint family income."

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14. A careful reading of the subsequent decision of the Supreme Court in (2003) 10 SCC 310 would reveal that actually there is no conflict between the said decision and the earlier decision reported in AIR 1961 SC 1268. In that sense the subsequent decisions of the Madras High Court, which have been referred to and relied upon in 2005(4) CTC 457, cannot be said to be in conflict with the decision of the Supreme Court in (2003) 10 SCC 310. The general principle is as reflected in several decisions such as A.I.R. 1954 SC 379 (SRINIVAS KRISHNARAO KANGO v. NARAYAN DEVJI KANGO AND OTHERS) and (2003) 10 SCC 310. The exception is carved out on the basis of the ratio of the decision in AIR 1961 SC 1268.

15. In our opinion, in the present case, the matter has been decided by the learned single Judge without keeping in view the nature of rival claim. In the present case, it was the specific case of the fourth defendant that properties had been purchased by utilising the money obtained by selling the joint family properties. The other plea of the fourth defendant is to the effect that the properties had been purchased from the joint exertion made by Palanichamy Gounder and his sons. It is not the case of the fourth defendant that Palanichamy Gounder had no independent source of income and he was in possession of some joint family fund.

16. In the present case, under Ex.B-3, 5.89 acres of agricultural land had been purchased for Rs.3,000/- in the name of Thanga Gounder, the grandfather of the plaintiff in 1944 and under Ex.B-4, 11.68 acres of land was purchased for Rs.2,000/- in 1945. There is no allegation nor any evidence that the grandfather was in possession of any surplus fund nor there is any allegation that he had no independent source. Therefore, no presumption can be raised that such property was the joint family property in the hands of the grandfather. However, the said property along with some other property were sold in 1958 by Palanichamy Gounder after the death of Thanga Gounder. Since such property was inherited by Palanichamy Gounder from his father, such property can be taken to be the joint family property in his hands. The property was sold under Ex.B-6 and in the sale deed it was recited that the property was being sold to meet the family expenses and agricultural expenses. After 1958, the father Palanichamy Gounder purchased certain property under Ex.A-4 in 1961, after a gap of more than three years. Therefore, there is no close proximity between the two transactions to infer that sale consideration amount received under Ex.B-6 was utilised for the purchase of the property in 1961 under Ex.A-4. Even the consideration amount for the transaction in 1961 is much higher. The evidence on record indicates that Palanichamy Gounder had some independent source of income as he was working as a labourer and he had also taken some lands on lease. Therefore, the ratio of the decision in 2005(4) CTC 457 (cited supra) cannot be applied to raise any presumption that the property purchased under Ex.A-4 in 1961 was a joint family property in the absence of any pleading and proof that there was sufficient joint family nucleus from out of which such property could have been

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purchased in 1961. In the absence of any proof that such property in 1961 had been purchased by utilising the consideration money relating to sale of any joint family property or there was any sufficient nucleus from out of which such property could have been purchased, in the absence of any other evidence and particularly keeping in view the fact that the father had some independent source of income, the contention of Defendant No.4 that such property was the joint family property cannot be accepted. The conclusion of the learned single Judge so far as it relates to such property is therefore not sustainable.

17. As already noticed, the grandfather of the plaintiff had purchased 11.68 acres of land under Ex.B-4 in 1945. Such property was sold on 21.6.1952 under Ex.B-5, by which date admittedly the grandfather had expired and the property had been inherited by Palanichamy Gounder, the father of the plaintiff. Therefore, in his hands, the property should be taken to be the joint family property. In Ex.B-5 sale deed itself it was recited that the property was sold to purchase other property. Under Ex.A-3 certain property was purchased in 1953. It is of course true that such property was purchased in the name of the father and mother. Even though there is some proximity between the two transactions, since the property was purchased jointly in the name of the father and a female member, it cannot be presumed that the entire property has been purchased by utilising the sale proceeds, particularly keeping in view the higher amount of consideration indicated in Ex.A-3. However, since a joint family property had been sold and in close proximity property under Ex.A-3 has been purchased jointly, it can be inferred that half of the property was the joint family property. In view of Section 45 of the Transfer of Property Act (See AIR 1976 Madras 227 [Tehmina Dinshaw Tehrani V. The Official Assignee and another]) it must be taken that consideration has been paid by both joint purchasers and since there is no indication as to how the consideration amount had been paid by each joint purchaser and since there is no proof that the property was purchased benami, it has to be assumed that the father and mother had equal share in such property. So far as father's share is concerned, in the absence of any other explanation regarding the source and since the father had sold the property in June, 1952 with the avowed purpose of purchasing the new property, it can be assumed that half of the property under Ex.A-3 is the joint family property and other half of the property was the property of the female member, namely, the wife of Palanichamy Gounder.

18. Under Ex.A-2, 5.83 acres of land was purchased in the name of Palanichamy Gounder for consideration of Rs.17,200/- on 17.10.1951. By such date, there had been no alienation of any property. Therefore, it cannot be assumed that the property purchased under Ex.A-2 was the purchase from out of the proceeds of any sale transaction relating to any joint family property. Therefore, such property cannot be considered as joint family property in the hands of Palanichamy Gounder.

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19. In view of the above discussion the inevitable conclusion is that the property purchased under Ex.A-2 in 1951 and the property purchased under Ex.A-4 in 1961 cannot be treated as joint family properties, whereas half of the property purchased under Ex.A-3 can be treated as joint family property and the other half as the property of Ramathal.

20. Even otherwise the learned single Judge had dismissed the entire suit completely ignoring the legal position regarding devolution of joint family property on the death of a male member of the joint family. Even assuming that all the properties were joint family properties, on the death of Palanichamy Gounder in 1961, after coming into force of the Hindu Succession Act, leaving behind Class-I female legal heirs, succession to such property would be in accordance with Section 8 read with Section 6 of the Hindu Succession Act. Palanichamy Gounder died in 1961 leaving behind his wife, three sons and three daughters. In the notional partition, as contemplated in Section 6 proviso, Palanichamy Gounder would have received 1/4th and his three sons, namely, Chinnappan, Subramaniam and Natarajan would have received 1/4th share each. (The system of giving one share to the mother equal to that of the son in the partition is not applicable to Madras School of Hindu Law and, therefore, Ramathal even if alive in 1961 was not entitled to any share in the notional partition). Therefore, 1/4th interest of Palanichamy Gounder devolved upon all the existing heirs in 1961. In other words, at that stage, the wife and three daughters were entitled to 1/28th each, whereas these three sons were entitled to 2/7. Natarajan, son of Palanichamy Gounder and Ramathal, died in 1977 issueless. Ramathal, the mother, being the only Class-I legal heir, 2/7th interest of Natarajan devolved upon Ramathal in 1977 and, therefore, the share of Ramathal became 1/28 + 2/7 = 9/28. Ramathal died in the year 1981 survived by two sons and three daughters. Therefore, each surviving son and the daughter was entitled to 1/5th in the interest of Ramathal, which comes to 9/140. Therefore, each daughter was entitled to 1/28 + 9/140 i.e., 1/10th in the joint family property, whereas each son was entitled to 7/20th share in such joint family property.

So far as the separate property is concerned, there is no dispute that each surviving son and daughter would be entitled to equal share.

21. It is now necessary to apply the aforesaid principle of law in ascertaining the shares in the properties. It has already been found that so far as the property under Ex.A-3 is concerned, half share in such property should be considered as joint family property and the other half of the property should be considered as property of Ramathal, wife of Palanichamy Gounder. So far as the half share of such property (which is considered as joint family property) is concerned, each daughter would be entitled to 1/10th in such half and each son would be entitled to 7/20 in such half. So far as the other half of the property under Ex.A-3 is concerned, the half share of Ramathal, wife of Palanichamy, would be inherited in equal proportion by each surviving child. In other words, the share of each daughter in the property under Ex.A-3 would be [1/2 x 1/10] +

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[1/2 x 1/5] = 1/20 + 1/10 = 3/20. So far as the share of each son is concerned, it would be [1/2 x 7/20] + [1/2 x 1/5] = 7/40 + 1/10 = 11/40.

22. So far as the properties covered under Exs.A-2 and A-4 are concerned, on the death of Palanichamy Gounder, the wife as well as each surviving child was entitled to 1/7th. On the death of Natarajan, such 1/7th was inherited by his mother Ramathal, whose share therefore became 2/7. On the death of Ramathal, her 2/7th share devolved upon all the five surviving children and, therefore, each was entitled to 2/35 share. Therefore, the share of each daughter became 1/7 + 2/35 = 7/35 i.e., 1/5 and similarly each son was entitled to 1/5th share.

23. Learned counsel appearing for the respondents had raised the question of relinquishment. The trial court after detailed consideration on this aspect came to the conclusion that the documents produced did not relate to the properties now in dispute, but related to other property and at any rate there had been no relinquishment. Learned single Judge has not at all adverted to such finding as the learned single Judge proceeded only on the question of presumption and burden of proof and dismissed the suit. Even though the learned counsel appearing for the respondents has submitted that the finding of the trial court in this aspect is not sustainable, we are unable to accept his submission as the trial court has come to the proper conclusion on this aspect by referring to relevant materials on record.

24. For the aforesaid reasons, we allow the appeal in part and pass a decree for partition. So far as the property covered under Ex.A-3 is concerned, the plaintiff, Defendant No.2 and Defendant No.3 are each entitled to 3/20th share and the branch of Defendant No.1 and the branch of Defendant No.4 are entitled to 11/40 share each. So far as the property covered under Exs.A-2 and A-4 are concerned, the plaintiff, Defendant Nos.1, 2, 3 and the branch of Defendant No.4 are entitled to each 1/5th share.

25. During pendency of the appeal, Defendant No.1 had died and the learned single Judge had exempted Defendant No.4, the appellant therein, from taking any steps for substitution. However, admittedly Defendant No.1 had left behind his legal representatives. In the final decree proceedings, the court should implead the legal representatives of the original Defendant No.1, namely Chinnappa Gounder, before proceeding to allot the properties to different parties. No order as to costs.

dpk

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To

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2. The Sub-Asst. Registrar, Judicial Section, High Court, Madras
3. The Record-keeper, V.R. Section, High Court, Madras

+ one cc to Mr.K.Srinivasan, Advocate Sr.No.33931.
+ one cc to Mr.M.M.Sundresh, Advocate Sr.No.33648.

PV (CO)
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